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In the Supreme Court of the United States

OCTOBER TERM 1958

NO. 52

HARRY A HAHN,

Petitioner,

v.

ROSS ISLAND SAND & GRAVEL CO.,
a corporation,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

PETITIONER'S REPLY BRIEF

DWIGHT L. SCHWAB,
712 Executive Building,
Portland, Oregon,
HERBERT C. HARDY,
1220 Equitable Building,
Portland, Oregon,
Counsel for Petitioner.

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PETITIONER'S REPLY BRIEF

ARGUMENT

In opening brief, petitioner pointed out the inexcusable and cold-blooded negligence of respondent resulting in petitioner's serious injury and incapacity (Pet. Br. 7, 17, 18). Respondent does not even attempt to deny or justify such conduct on its part. It only seeks to evade the consequences of Oregon law by attempting to hide behind the U. S. Constitution.

No Conflict with Federal Law

Basically, all respondent has to rely on is the doctrine in *Southern Pacific Co. v. Jensen*, 244 US 205, 37

S Ct 524, 61 L Ed 1086. But it seeks to elicit aid from such cases as:

> Pope & Talbot, Inc. v. Hawn, 346 US 406, 74 S Ct 202, 98 L Ed 143 (Resp. Br. 10).
>
> Garrett v. Moore-McCormack Co., 317 US 239, 63 S Ct 246, 87 L Ed 239 (Resp. Br. 12).
>
> McAllister v. Magnolia Petroleum Company, 357 US 221, 78 S Ct 1201 (Resp. Br. 14).

In each of those cases the employer attempted unsuccessfully to deprive the workman of federal rights by means of a restrictive state law at odds with applicable federal law. The gravamen of these cases seems to be as stated in the *Garrett* case (317 US at 245):

> "The constant objective of legislation and jurisprudence is to assure litigants full protection for all substantive rights intended to be afforded them by the jurisdiction in which the right itself originates. Not so long ago we sought to achieve this result with respect to enforcement in the federal courts of rights created or governed by state law [citing *Erie Railroad Co. v. Tompkins*, 304 US 64]. And Admiralty Courts, when invoked to protect rights rooted in state law, endeavor to determine the issues in accordance with the substantive law of the State [citing *Western Fuel Co. v. Garcia*, 257 US 233, 242. *The Hamilton*, 207 US 398, 404]. So here, in trying this case the state court was bound to proceed in such manner that all the substantial rights of the parties under controlling federal law would be protected."

There is no conflict here. We are not dealing with a state law that *restricts* federally created admiralty rights in an injured workman. To the contrary, the employee desires that state law apply.

The "twilight zone" rule as enunciated in the case of *Davis v. Department of Labor & Industries*, 317 US 249, 63 S Ct 225, 87 L Ed 246, is premised on the statement:

> "Prima facie, every state is entitled to enforce in its own courts its own statutes lawfully enacted." (317 US at 258.)

Where an injured workman is injured on navigable waters in an equivocal situation, he has a choice of state or federal remedy. Questioned state laws are presumed to be constitutional where the workman seeks state relief. Significantly, respondent, like the Oregon Supreme Court, chose not to discuss this presumption of constitutionality (Pet. Br. 16). There is here a presumption that the application of Oregon law (ORS 656.006, 656.024; Pet. Br. 29, 30) is constitutional.

Cases such as *Pope & Talbot* (346 US 406), *Garrett* (317 US 239), and *McAllister* (357 US 221) (all supra 2), are not at odds with the *Davis* case. It is noted the *Garrett* case was decided the same day as the *Davis* case, with both opinions authored by the same Justice.

The "Twilight Zone" Is Not Confined to Compensation Payments

Respondent argues that in the "twilight zone" the allowable state remedy is confined solely to pure compensation as such (Resp. Br. 22-26).

Respondent's expressed concern over the fate of the poor working man who cannot get compensation pro-

duces a hollow echo. It was the sole and exclusive act of respondent that deprived all of its workers of state compensation, whether amphibious or strictly land based. Now respondent wants to deprive petitioner of his substitute remedy because it will be cruel not to give him compensation!

Respondent (Resp. Br. 23, 24) seeks comfort in the words of the Longshoremen's Act:

> " * * * if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law," [33 USC 903(a); Pet. Br. 27.]

Oregon does validly provide compensation per the *Davis* line of cases. Only employers such as respondent who chose not to allow their employees to enjoy it must face the actual consequences of their negligence.

Petitioner quotes at length from Gilmore and Black, "The Law of Admiralty" (Resp. Br. 24, 25), wherein the authors speculate on the absence of a "twilight zone" between a compensation proceeding on one hand and an action under the FELA, the Jones Act or maritime law on the other. The authors suggest there is a difference between choosing between two compensation statutes, and choosing between a compensation statute and a court action. They are referring (p. 356) to cases such as *Penn. Railroad Co. v. O'Rourke*, 344 US 334, 73 S Ct 302, 97 L Ed 367.

This point was covered in petitioner's opening brief (19, 20). Obviously the authors' reasoning does not carry to this case. Here the employer can fully protect

itself from an action for negligence anytime it so chooses by signifying its intent to comply with the compensation act (ORS 656.028; Pet. Br. 30).

"Twilight Zone" Doctrine Has Not Been Overruled

But more basically, the quotation from Gilmore and Black is inapropos, for cases such as *O'Rourke* involve wholly different questions than exist here (Pet. Br. 20) The *O'Rourke* case involved only the interpretation and construction of two federal statutes. There was no constitutional question (Footnote 8, 344 US at 341). The court clearly pointed out the same basic distinction in *Norton v. Warner* (Footnote 3, 321 US 565, 569).—The instant case involves only a constitutional question. Statutory construction is not involved.

Respondent seems to argue nevertheless that the *Davis, Baskin* [*Baskin v. Industrial Accident Commission* 338 US 854, 70 S Ct 99, 94 L Ed 523 (89 Cal App 2d 632, 201 P2d 549) (sub nom *Kaiser Co. v. Baskin*), 340 US 886, 71 S Ct 208, 95 L Ed 643 (97 Cal App 2d 257, 217 P2d 733)] and *Moores* [Moores' Case (sub nom *Bethlehem Steel Co. v. Moores*), 335 US 874, 69 S Ct 233, 93 L Ed 417 (323 Mass 462, 80 NE 2d 478)] cases have been "overruled" by language in the *O'Rourke* case (Resp. Br. 20, 21).

It seems obvious why this court said New Jersey could not have enacted statutes granting compensation for this brakeman on navigable waters (344 US at 337). He was working for an interstate railroad. No state could cover such a worker with compensation anywhere:

Erie Railroad Co v. Winfield, 244 US 170, 37 S Ct 556, 61 L Ed 1057.
Scrinko v. Reading Co. (DC NJ), 117 F Supp 603, 609.

The court was merely fitting the injured brakeman into the language of the Longshoremen's Act [33 USC 903(a)] to show he was covered thereby. This was done preparatory to holding that as a matter of statutory construction, the Longshoremen's Act was, by its terms, the exclusive remedy where another *federal* act was also involved.

If respondent's interpretation of this language is accepted, the *Davis, Moore* and *Baskin* cases are out. Obviously, before any "twilight zone" question can arise, a condition precedent must be an injury on navigable waters.

Not long after the *O'Rourke* decision this court cited *Davis, Moores* and *Baskin* cases as authority for its action in the case of *Avondale Marine Ways v. Henderson*, 346 US 366, 98 L Ed 77, 74 S Ct 100.

An example of the misconception of the *O'Rourke* language is *Green v. Simpson & Brown Const. Co.*, 14 N.J. 66, 71, 101 A2d 10.

The court in *Flowers v. Travelers Insurance Company* (CCA 5), 258 F2d 220 at 223, 224, appears to have equally misconstrued the *O'Rourke* case. Here the Fifth Circuit follows generally the language of *De Bardeleben Coal Corp. v. Henderson* (CCA 5), 142 F2d 481. The Fifth Circuit, like the Oregon Supreme Court (Pet. Br. 21), appears not to like the *Davis* solution.—Other

cases cited by respondent in Appendix "C" (48), whatever the language, nevertheless achieve the "twilight zone" solution by allowing to the workman his choice of remedy between state and federal law.

No Uniformity of Maritime Law Problem

Respondent argues the standard of care provided by the Oregon Employers' Liability Act is inimical to maritime law (Resp. Br. 27-30).

It is incongruous that respondent's whole argument must be bottomed exclusively on the *Jensen* philosophy. That case dealt with a state compensation statute. Yet, respondent readily agrees that a state compensation statute may now constitutionally be applied in the "twilight zone." There is no higher standard of care existent than under a compensation statute—liability without fault. When respondent rejected the Oregon Act, it actually subjected itself to a *lesser* standard of care—not a higher one. The Oregon Supreme Court states it as follows in *Shelton v. Paris*, 199 Or 365, 369, (261 P2d 856).

> "Employers not operating under the Workmen's Compensation Act in this state are not insurers. 'They are liable for consequences, not of danger, but of negligence. * * *'; * * *; and if engaged in a hazardous occupation, as in this case, they are deprived of certain defenses."

Furthermore, it is difficult to envision greatly higher standards of care than exist in maritime situations such as the doctrine of unseaworthiness and under the Jones Act. Some recent decisions of this court along this gen-

eral line, with particular note as to the standard of care and type of employment are:

Seas Shipping Co. v. Sieracki, 328 US 85, 66 S Ct 872, 90 L Ed 1099;

Pope & Talbot, Inc. v. Hawn, 346 US 406, 74 S Ct 202, 98 L Ed 143;

Alaska S. S. Co. v. Petterson, 347 US 396, 74 S Ct 601, 98 L Ed 798;

Senko v. LaCrosse Dredging Corp., 352 US 370, 77 S Ct 415, 1 L Ed 2d 404;

Butler v. Whiteman, 356 US 271, 2 L Ed 2d 754, reversing per curiam sub nom *Harris v. Whiteman*, 243 F2d 563 (CCA 5);

Grimes v. Raymond Concrete Pile Co., 356 US 252, 2 L Ed 2d 737, reversing per curiam 245 F2d 437 (CCA 1).

Language in cases such as *Hess v. U. S.*, 259 F2d 285 (CCA 9), quoted by respondent (Resp. Br. 28) thus appears unrealistic and hypertechnical.

Furthermore, the *Hess* case involved an attempted third party action against the United States—not the employer. Finding of Fact No. 29 of the trial court was that the Oregon State Industrial Accident Commission was paying compensation to the beneficiaries of decedents, indicating a practical and humane application of the "twilight zone" doctrine by the Commission. It is not a situation, as here, where the employer attempted to deprive his workers of all state relief by rejecting the Act.

Petitioner Clearly a "Twilight Zone" Employee

Respondent then argues this case falls outside the "twilight zone" because:

1. Petitioner's usual duties were exclusively on water (Resp. Br. 18).

Respondent fails to mention such cases as *Mark v. Portland Gravel Co.*, 130 Or 11, 278 P 986 (1929), where, long before the *Davis* decision, and during the height of the *Jensen* case, courts held that commercial dredging on navigable waters was outside admiralty jurisdiction. Petitioner's usual and regular duties consisted solely of commercial dredging (Pet. Br. 4-6).

See 2 Schneider Workmen's Compensation, Perm. Ed. § 247, p. 23 (1942) (written before the *Davis* decision).

2. At the time of injury petitioner was helping load respondent's hopper (Resp. Br. 19).

In the *Davis* case, the injured workman was loading steel on a barge on navigable waters. This was Davis' regular job. Here loading was not Hahn's regular job. The language used by respondent in its brief (18, 19, 21) to describe petitioner's work is reminiscent of that used by the Washington Supreme Court in characterizing the work of *Davis* (12 Wn 2d 349 at 353, 354, 121 P2d 365, 366, 367).

3. Respondent attempts to pose petitioner as a longshoreman, and itself as a ship and barge hauler (Resp. Br. 18, 19).

Petitioner was an "oiler" on a dredge bringing up gravel from respondent's private lagoon, for commercial sale by respondent. Respondent was, as its name implies, a sand and gravel merchant; with a lucrative side

line of renting space in its lagoon for parking log rafts (Pet. Br. 4-6).

Even in the "local concern" days, during the zenith of the *Jensen* case, this case would be one earmarked for state law.

Sound Policy Requires That Petitioner Be Allowed to Maintain This Action

Petitioner in opening brief pointed out the large number of "twilight zone" employees over the country adversely affected by this decision, particularly in elective compensation states (Pet. Br. 11-13).

Petitioner also showed the harmful consequences and illogic of allowing an employer to completely escape responsibility under state law to injured employees by the device and expedient of rejecting the state act (Pet. Br. 21-24).

Respondent apparently recognizes the untenable nature of its insistence that it can unilaterally deny all state remedy to its employees. As a consequence, it goes completely outside of the record of the case in a futile attempt to justify itself.

Respondent sets out in 14 pages (Appendix "B", 34-47) what it denominates a "standard" policy of private insurance. It then seems to insinuate and hope that this court will suspect it carried such a policy on its employees at the time of this injury, and that all rejecting employers do the same. There is not a shred of substantiating evidence in the record.

This is the second time respondent has seen fit to

bring up this matter in this court *dehors* the record (see Brief in opposition to petition for a writ of certiorari, 4; and petitioner's reply thereto, 2). There is no evidence of such policy, that petitioner was ever told about such a policy, or offered any benefits thereunder.

Normally the best method of handling an argument based on matter *dehors* the record is to ignore it. However, here respondent would have this court believe that such policy contains the equivalent of workmen's compensation benefits in Oregon. So outrageous is this insinuation that we must point out some glaring differences.

To begin with, such policy has no standing whatever. The preface to "Annotated Laws Relating to the State Industrial Accident Commission With 1957 Amendments," published by the Oregon State Industrial Accident Commission, states at page 5:

> "Employers rejecting the law by electing not to contribute are deprived of common law defenses and may not defeat damage actions by their workmen where the workman is negligent, where a fellow workman is negligent or where the workman knowingly exposes himself to danger. The rejected employer is subject to the Employer's Liability Act and is liable for injuries chargeable to him without limit on the amount of damages. Private carriers write liability policies against such risks but *the law recognizes no private workmen's compensation insurance as such in Oregon.*" (Emphasis added.)

Paragraph 16 (Resp. Br. 43) well illustrates the quality of such a policy.—A simple agreement between the insurer and employer cuts off an injured employee, after injury, without one cent. This may be done even after

an offer has been made the employee. *The employee has no standing to even protest!* What a whip to coerce acceptance of an unpalatable and inadequate offer! No employee could ever count on any benefits, however serious and permanent his injury might be.

Further comparisons are illuminating:

1. The policy can be cancelled by insurer or employer anytime on ten days' notice, Provision 5 (Resp. Br. 39).—Under the Act, employees of all employers in hazardous occupations not rejecting the Act are automatically covered by compensation, even where employers are in default on payments to the Commission. Coverage can never be cancelled by the State (ORS 656.314).

2. The insurance is in excess of all other insurance carried by employer, Provision 9 (Resp. Br. 40). This can readily involve injured employee in jurisdictional warfare between companies resulting in delay and uncertainty—assuming the employer and insurer haven't already decided he gets none anyhow under Provision 16.

3. Arbitration required in case of dispute on extent of disability, with half the cost to employee, Provision 14 (Resp. Br. 42).—ORS 656.288 grants the employee trial by jury in case of dispute at no cost, and such cases have priority over all other civil cases. (ORS 656.324 grants the same priority in actions such as this case against rejecting employers, thus preventing delay).

4. Employee must give full release. Otherwise he receives no benefits, Provision 14(e) (Resp. Br. 43).—

Under workmen's compensation, benefits are paid and no rights are released (ORS 656.202).

5. The policy provides nothing for aggravation—ORS 656.276 gives the workman two years to show he is entitled to increased compensation. The following is apropos from the preface to "Annotated Laws Relating to the State Industrial Accident Commission With 1957 Amendments," published by the Oregon Commission (supra), at page 5:

> "The Commission has continuing jurisdiction and the right to file claim for aggravation obviates the evils of systems where acceptance of benefits or signing a release forever closes the door. Benefits provided by the Oregon Law are now among the most liberal in the United States."

6. The insurance company, upon recovery from a negligent third party, keeps everything up to the amount paid in benefits, Provision 17 (Resp. Br. 43).—ORS 656.322 grants a portion of the recovery to the employee.

7. The policy carries limitation of liability of $100,000 for one accident (Resp. Br. 44). (In *Pease v. Roseburg Lumber Co.*, 206 Or 658, 294 P2d 346, under a similar "standard" policy, it was $5,000). In the event of a catastrophe the policy could not cover all losses (e.g., *King v. State Industrial Accident Commission,* 211 Or 40, 309 P2d 159—four fatalities).—The Oregon Act carries unlimited total benefits (ORS 656.204-656.210).

8. The policy carries a limitation of $100,000 for occupational disease over the entire policy period (Resp. Br. 45)—under Oregon law, no limitation.

The Oregon court in *Whitehead v. Montgomery Ward*, 194 Or 106 at 130, 239 P2d 226 (1952), unfavorably compared some of the provisions of one of these policies with the Oregon Act. Significantly, respondent did not cite this rather recent case in its brief.

Workmen's compensation benefits under well administered state laws are meager enough at best:

> Richter & Forer, 36 Cornell Law Quarterly 203, 214;
>
> Samuel B. Horowitz, 5 NACCA Law Journal 11-17 (Mr. Horowitz was quoted by respondent in its brief at page 24);
>
> Arthur Larson, Undersecretary of Labor, "Model T" Compensation Acts in the Atomic Age, 18 NACCA Law Journal 39.

The comment of Amicus Curiae that the provisions of such policies are a "closely guarded secret" is fully understandable (Amicus Curiae Br. 3). Also understandable is why this case has gone on for three years and into three courts before this policy was mentioned for the first time.

* * * * *

Respondent attempts to disparage petitioner for bringing this action, and suggests he could always have obtained Longshoreman's benefits (Resp. Br. 21, 26). Certainly there is no reason to suppose that respondent will not fight the payment of such benefits exactly the same as respondent has litigated this case. The ingenuity of employers in frustrating recovery, whatever remedy an injured employee may seek, has been amply demonstrated. That was one big and impelling reason for the "twilight zone" doctrine (*Davis* case, 317 US at 253, 254).

There are several thousand miles of navigable waters in Oregon (Snake, Columbia, Willamette Rivers; the Pacific Ocean with its many coastal rivers and streams). Many other states are comparable. Hundreds of employers engage in hazardous local and "twilight zone" activities along these waters. Many, like respondent, are willing and anxious to escape the cost of providing state compensation for their employees. The only thing keeping them in line is fear of actions of this type under ORS 656.006 and ORS 656.024. If these employers can totally escape state responsibility for injuries to their employees by rejecting the Act, the consequences are apt to be devastating to many workers—amphibious and particularly land based. Thus the still large ranks of uncovered workers will expand rather than lessen (Pet. Br. 12).

This employer deliberately rejected the compensation Act. If elective compensation acts are to have any vigor, respondent must be forced to abide by its election to accept liability for its negligence. It is inconceivable that the Constitution could sanction recovery of workmen's compensation in the "twilight zone," but forbid recovery of compensation for inexcusable negligence under these circumstances.

CONCLUSION

For the reasons stated herein and in opening brief, it is respectfully submitted that the judgment of the Court below should be reversed.

DWIGHT L. SCHWAB,
712 Executive Building,
Portland 4, Oregon,

HERBERT C. HARDY,
1220 Equitable Building,
Portland 4, Oregon,

Counsel for Petitioner.